STATE OF MICHIGAN

COURT OF APPEALS

EDGEWOOD HOLDINGS, LLC, Plaintiff-Appellant,	UNPUBLISHED October 16, 2018
v	No. 343109 Otsego Circuit Court
COUNTY OF OTSEGO, Defendant-Appellee.	LC No. 17-016819-CH

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ.

PER CURIAM.

In this zoning case, plaintiff, Edgewood Holdings, LLC, appeals as of right the trial court's order granting summary disposition to defendant, Otsego County, on the basis that plaintiff's pleadings were insufficient and the case was not ripe for review. On appeal, plaintiff challenges only the trial court's determination that the finality requirement necessitated that plaintiff pursue alternative remedies before seeking judicial review. We affirm.

Plaintiff owned property situated in Bagley Township, Otsego County, Michigan within the R-1 District[1] under the Otsego County Zoning Ordinance. Plaintiff requested a permit from the Otsego County Zoning Board of Appeals (ZBA), under Zoning Ordinance Section 21.44,[2]

[1] According to the Otsego County Zoning Ordinance, R-1 districts "are designed to provide for one (1) and two (2) family (duplex) dwelling sites and residential related uses." Permitted uses include dwellings, parks, farms, family care facilities, cemeteries, and personal storage structures. Additional permitted uses are subject to special conditions and include churches, libraries, schools, colleges, golf courses, group care facilities, utility service structures, telecommunication towers, and unlisted properties authorized under Article 21.44.

[2] Otsego County Zoning Ordinance Section 21.44 Unlisted Property Use Provides:

> The County Zoning Board of Appeals shall have power on written request of a property owner in any Zoning District to classify a use not listed with a comparable permitted use in the District giving due consideration to the provisions of Article 19 of this Ordinance when declaring whether it is a use permitted by right or by special permit. If there is a comparable use, then the

requesting that it be allowed to place some self-storage, pole-barn structures on their land that would be rented out commercially. After a public hearing, the zoning board ultimately denied the request, indicating that there was no comparable use in the R-1 district, and provided plaintiff with two options to go forward—request to have the property rezoned or request an amendment of the text of the R-1 district to allow for such use. Plaintiff immediately filed a four-count complaint in circuit court alleging 1) unequal and unlawful discriminatory application of the zoning ordinance, 2) a violation of plaintiff's substantive due process rights, 3) that the ZBA's actions amounted to a confiscatory taking, and 4) a violation of 42 USC 1983.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(4), (C)(8), and (C)(10). It argued that the zoning ordinance was not unconstitutional as applied to plaintiff and did not violate plaintiff's rights to equal protection or deprive plaintiff of its substantive due process rights. It further argued that plaintiff had not been deprived of an economically viable use of its property because plaintiff had not identified any reason why the land was unsuitable for the permitted R-1 district uses, and that by filing a complaint without pursuing the options provided by the ZBA, plaintiff had failed to satisfy the rule of finality required in takings claims and thus any claims made by the plaintiff were not ripe.

At the motion hearing, plaintiff argued that their complaint was a "facial challenge"[3] to the constitutionality of the statute and that the doctrine of finality did not apply. However, defendant identified several instances with the complaint where plaintiff specifically indicated that the claims were "as-applied challenges."[4] Plaintiff also argued that the rule of finality applied only to administrative remedies, while rezoning was a legislative function. Further, plaintiff's counsel argued that the court could not order plaintiff to pursue a rezoning. Ultimately, the trial court rendered a written opinion addressing the insufficiency of each of plaintiff's claims and dismissed the action without prejudice. The court acknowledged that

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> procedures established in this ordinance for approval of a permit for that use must next be initiated in order for the applicant to apply for the necessary permit(s). If there is no comparable use then the applicant shall be so informed and an amendment to the text of the ordinance or a rezoning would be necessary prior to establishing requested use on the property.

[3] "A facial challenge is one in which the complainant alleges that the very existence of a zoning ordinance or decision adversely affects and infringes upon the property values of the rights of all landowners within the governed community." *Hendee v Putnam Twp*, 486 Mich 556, 568 n 17; 786 NW2d 556 (2010). "[T]he rule of finality does not apply to true facial challenges because such challenges attack the very existence of the ordinance or decision." *Id*.

[4] "An as-applied challenge is one in which the complainant alleges that the individual landowner suffers from a specific and identifiable injury as a result of the township's zoning ordinance or decision." *Hendee*, 486 Mich at 568 n. 17. As-applied challenges are subject to the rule of finality and are not ripe for judicial review until the complainant can establish a final decision causing injury. *Id*.

plaintiff would be entitled to bring any pertinent previously filed claims and any additional claims available again in the future once all other possible remedies were exhausted.

On appeal, plaintiff argues that the trial court erred in determining that the finality requirement in *Hendee v Putnam Twp*, 486 Mich 556; 786 NW2d 556 (2010), requires landowners to request a rezoning prior to judicial review where the landowner's action concerns the land as currently zoned. More specifically, plaintiff argues that the finality requirement discussed in *Hendee* and *Braun v Ann Arbor Charter Twp*, 262 Mich App 154; 683 NW2d 755 (2004), only applies to cases in which a rezoning is sought, and that summary disposition was not appropriate in this case because plaintiff did not seek a rezoning. We disagree.

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Summary disposition under MCR 2.116(C)(4) is proper "when a plaintiff has failed to exhaust its administrative remedies." *Rudolph Steiner Sch of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999). A motion brought under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint, should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition under MCR 2.116(C)(10) is proper when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "Because a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, the circuit court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012) (citation omitted).

The United States Supreme Court has explained that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue." *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186; 105 S Ct 3108; 87 L Ed 2d 126 (1985). This "finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id*. at 193. Moreover, the government's "action is not 'complete' in the sense of causing a constitutional injury 'unless or until [the government] fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.* at 195.

The Michigan Supreme Court likewise has held that a constitutional taking claim is "not ripe" when the possibility remains that the plaintiff could obtain a variance, and such a variance is not sought. *Paragon Properties Co v City of Novi*, 452 Mich 568, 776; 550 NW2d 772 (1996). Furthermore, "where the possibility exists that a municipality may have granted a variance—or some other form of relief—from the challenged provisions of the ordinance, the extent of the alleged injury is unascertainable unless these alternative forms of potential relief are pursued to a final conclusion." *Conlin v Scio Twp*, 262 Mich App 379, 382; 686 NW2d 16 (2004), citing *Paragon*, 452 Mich at 580-581.

In the present case, plaintiff was denied a declaration by the ZBA that its pole barn storage units would be permissible in an R-1 district as a "comparable" use. The letter from the ZBA apprised plaintiff that it could pursue rezoning of the property to a different zoning district that would allow commercial self-storage units or could request an amendment of the zoning ordinance to allow such use in the R-1 district. However, it is undisputed that plaintiff never pursued the alternative relief suggested. Rather, plaintiff argued at the trial court level that its claims were "facial challenges," and thus exempt from the finality requirement. The trial court addressed each of plaintiff's claims and determined that plaintiff's claims were "as applied" and that the finality requirement had to be met before plaintiff's claims could be ripe for judicial review.

On appeal, plaintiff does not raise the argument that its claims were facial challenges, nor does plaintiff argue that the finality requirement does not apply. Rather, plaintiff appears to suggest that the trial court erred by applying what it characterizes as defendant's overly broad interpretation of *Hendee*. Plaintiff suggests that the finality requirement discussed in *Hendee* and *Braun* only applies to cases in which a rezoning is sought. However, a review of these cases indicates that these decisions do not apply only to rezoning, but instead to the requirement that plaintiffs must pursue every available method of obtaining relief in zoning disputes before resorting to judicial review. In *Braun,* after being denied rezoning by a township board, the plaintiffs failed to pursue options to petition for review of a board's decision or, alternatively, to seek a variance from the zoning board of appeals. *Braun*, 262 Mich App at 159. Likewise, in *Hendee*, after being denied a variance by a zoning board of appeals for lower-density residential use, the plaintiffs failed to follow through on an application for rezoning on their proposed higher-density use for a manufactured housing community before seeking judicial review.[5] *Hendee*, 486 Mich at 567-568. Specifically, the *Hendee* Court noted:

> Plaintiffs' failure to seek rezoning of their property for MHC development denied the township any opportunity to assess plaintiffs' MHC proposal and arrive at a definitive decision from which the court could determine whether plaintiffs had sustained any actual or concrete injury. Consequently, plaintiffs have not exhausted their administrative remedies, the township has rendered no final decision, and plaintiffs' exclusionary zoning claim is not ripe for judicial review. [*Id.* at 573.]

In both cases, the failure of the plaintiffs to seek available alternative relief rendered their claims premature for litigation. These cases were not specifically concerned with whether a variance,

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[5] The *Hendee* Court noted that under this Court's holding in *Paragon*, "a plaintiff's complaint is not ripe for judicial review until the zoning authority has reached a final decision and the plaintiff has exhausted *every* administrative appeal." *Hendee*, 486 Mich at 569 (emphasis added). In *Paragon*, this Court held that the plaintiff's case was not ripe because although plaintiff's request for rezoning was denied, the plaintiff failed to pursue a use variance or bring an inverse condemnation action prior to requesting judicial review. *Paragon*, 206 Mich App at 76.

use permit, or rezoning request was initially requested and denied, but rather with whether *all* available methods of obtaining relief had been pursued to obtain a final decision. In this case, no definitive decision was reached from which the court could determine whether plaintiff had sustained any actual or concrete injury because the ZBA provided plaintiff with two options to pursue, and the approval of either alternative would provide plaintiff's requested relief.

On appeal, plaintiff states, "Edgewood submits a land owner must exhaust administrative remedies *and* obtain a final decision from the initial decisionmaker that the land owner has petitioned for rezoning, prior to judicial review." However, within its argument, plaintiff never claims that it has exhausted all administrative remedies, or that it has obtained a final decision from the initial decision-maker. Rather, plaintiff asserts that it need not apply for rezoning before challenging the administration and enforcement of the current zoning ordinance. However, plaintiff cites no support for this proposition. Plaintiff also does not suggest any reasons for why a request for rezoning would be inappropriate. Instead, plaintiff simply attacks defendant's position, by alleging that rezoning is inappropriate because "[t]he landowner is subjected to layers of bureaucracy" or "must seek to rezone an entire district impacting every landowner in the district." Furthermore, on appeal, plaintiff makes no mention of the alternative option suggested by the ZBA of an amendment to the zoning district language, and does not provide any argument for why it failed to exercise this additional option. However, it is clear that by bringing a claim alleging that the application of the zoning ordinance results in a taking of plaintiff's property, plaintiff subjected its claims to the finality requirement established in *Williamson Co*, 473 US 172, 186. Accordingly, the trial court did not err in finding that plaintiff's failure to pursue alternative options of a rezoning of the property to a different zoning district or an amendment of the zoning ordinance renders this case "not ripe for judicial review." *Conlin*, 262 Mich App at 382.

Defendant also correctly notes that the trial court based summary disposition on other grounds and that plaintiff has failed to challenge those grounds, thereby abandoning those issues. Since plaintiff has not challenged all the other grounds for summary disposition noted in the trial court's opinion, we will not address these additional grounds for dismissal.

However, while the unchallenged findings are dispositive and support a conclusion that this Court should affirm the trial court's dismissal, we note that the trial court must give the parties an opportunity to amend their pleadings as provided by MCR 2.118 when granting summary dispositions under MCR 2.116(C)(8), (C)(9), or (C)(10), unless such an amendment would not be justified. Indeed, this Court has held that when deciding a motion for summary disposition on certain grounds, a court must give the parties an opportunity to amend unless amendment would be futile. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). In this case, the trial court did not foreclose the possibility that plaintiff would have the ability to amend the complaint in an effort to resolve the issues the trial court identified. Instead, the trial court stated that "even if Plaintiff were to amend the complaint in order to remedy the issues detailed above, this Court feels this case is not ripe for review under the finality doctrine." Thus, the trial court appears to acknowledge that plaintiff could remedy the discussed issues if allowed to amend their pleadings. Furthermore, the trial court explicitly stated that after exhausting its possible remedies, "[plaintiff] would be entitled to bring the above claims and/or any additional claims available [to this court] again in the future." Indeed, the trial court did not foreclose the possibility that amendments, new claims, or even the dismissed claims would be viable "as

applied" once all possible remedies were exhausted. Accordingly, while this Court need not address the other grounds provided for summary disposition because they were not raised on appeal, by affirming the trial court's dismissal, we also affirm the trial court's ruling that plaintiff may bring the same or any additional claims to the trial court in the future, consistent with the trial court's order.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Brock A. Swartzle